IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.19 OF 2006

National Bank for Agriculture and Rural Development, incorporated and Constituted under the National Bank for Agriculture and Rural Development Act, 1981 Having its Head Office at Plot No.C-24, "G" Block, Bandra-Kurla Complex, P.O. Box No.8121, Bandra (East) Mumbai-400 051. ....Petitioners (Ori.Respdts.)

V/s.

M/s.Unity Construction Co. Ltd. a Partnership firm having their office at 1252, Pushpanjali Apartment, 1st Floor, Old Prabhadevi Road, Mumbai-400 025, through its Partners (1) Shri K.K. Avarsekar, (2) Shri K.C. Vasandan, (3) Mrs.Pushpa K. Avarsekar, (4) Mr.Abhijit K. Avarsekar carrying on their business under the Indian Partnership Act. ....Respondent (Ori.Claimants)

Ms.Snehal M. Paranjpe i/b Mohana Nair Associates for the Petitioners.

Mr.Ketan Parekh i/b Kadam & Co. for the Respondent.

CORAM : S.J. VAZIFDAR, J.
DATED : 18TH OCTOBER, 2006.

ORAL JUDGMENT :

1. This is a Petition under Section 34 of the Arbitration and Conciliation Act, 1996 for setting aside an award dated 1.8.2005 as corrected on 19.9.2005.

2. The Petitioners issued a notice inviting tenders for the construction of a building. The Respondent was the successful tenderer.

3. Initially a work order dated 21.2.1995 was issued. The work order confirmed the acceptance of the Respondent’s tender. The value of the contract was stipulated to be Rs.43,67,46,795=70.

4. Thereafter a written contract dated 15.5.1995 was executed between the parties. Clause 2 of the agreement refers to the architect appointed by the Petitioners and a Project Management Consultant (PMC). Clause 9 of the agreement read as under :-

> "9. The employer reserves to itself the right of altering the drawings and the nature of the work through the Architects / PMC by adding to or omitting any items of work or having portions of the same carried out without prejudice to this contract.

5. The last recital stipulated that the Respondent had agreed to execute the work subject to

the provisions contained therein as also inter-alia in the General Instructions to the contractors, General Conditions of Contract, Special Conditions and Construction Schedule. It would be convenient to set out the relevant clauses of the incorporated documents/terms which fall for consideration.

(A) Clauses 2-a and 2-e, 30, 31 and 40 of the General Conditions of Contract read as under :-

> "2. **SCOPE OF CONTRACT :**
>
> The Contractor shall carry out and complete the works in every respect in accordance with this Contract and with the directions of and to the satisfaction of the Architect / PMC / Employer. The Architect / PMC / Structural Consultant may in absolute discretion and from time to time issue further drawings and/or written instructions, details, directions and explanations which are hereafter collectively referred to as "instructions" reflected either in the minutes or in any other form in regard to :-
>
> a. The variation or modification of the design quality or quantity of works or the addition or omission or substitution of any work.
>
> b. .....
>
> c. .....
>
> d. .....
>
> e. The postponement of any work

to be executed under the provisions of this Contract."

30. **DELAY AND EXTENSION OF TIME :**

If in the opinion of the PMC the works be delayed (a) by force majeur or (b) by reason of any exceptionally inclement weather or (c) by reason of proceedings taken or threatened by the dispute with adjoining or neighbouring owners or public authorities arising otherwise than through the Contractor's own default or (d) by the works or delays of other Contractors or tradesmen engaged or nominated by the Employer or the PMC and not referred to in the Schedule of Quantities and/or Specifications or (e) by reason of the PMC's instructions as per clause (g), or (f) by reason of civil **commotion (to be checked)**, legal combination of strike or lock-out affecting any of the building traders or (g) in consequence of the Contractor not having in due time necessary instructions from the PMC for which he shall have specifically applied in writing, ahead of time, giving the Consultant reasonable time to prepare such instructions, the **Employer/PMC (to be checked)** shall make a fair and reasonable extension of time for completion of the Contract works. In case of such strike or lock-out, the Contractor shall, as soon as may be, given written notice thereof to the PMC, but the Contractor shall nevertheless constantly use his endeavours to prevent delay and shall do all that may reasonably be required to the satisfaction of the Consultant to proceed with the work.

31. **DAMAGES FOR NON-COMPLETION :**

(a) If the Contractor fails to complete the works by the date named in Clause 29 (date of completion) or within any extended time under clause

30 (Extension of Time) and if the P.M.C. shall certify in writing on or before the date of issue of the Certificate for the last payment to which the Contractor may become entitled hereunder that the works could reasonably have been completed by the date or within the said extended time, then the Contractor shall pay or allow the Employer the sum to be worked out **as 0.25% (to be checked)** of contract price per week to be recovered as Liquidated Damages (and not by way of penalty) for the delay, beyond the said date or extended time, as the case may be, during which the works shall remain unfinished and such damages may be deducted from any moneys due or which may become due to the Contractor. The maximum amount of Liquidated damages shall be 5% of contract price."

"40. **MATTER TO BE FINALLY DETERMINED BY THE PMC :**

The PMC's decision, opinion, direction, Certificates (except for payments) with respect to all or any of the matter under clauses 2, 7, 9, 17, 23, 30 (a), (b), (c), (d), (f) and the schedule of rates as contained in Annexure VII, hereof and as to the exercise by him under clause 12 of the right to have any works opened up, (which matters are here in referred to as the excepted matters) shall be final and conclusive and binding on the parties hereto and shall be without appeal. Architect or Employers instructions if any, in this regard in case of any urgency, shall also be conformed / vetted by the PMC at the earliest possible."

4. Clauses 8, 58, 59 of the Special Conditions of Contract read as under :-

"8. **PROGRAM OF WORK :**

The Bidder shall, along with his bid, submit a schedule for completion of work, either in the form of a CPM Net Work or in the form of a bar chart, showing how he proposes to complete the works. This program shall be prepared in sufficient detail and shall indicate, among other things, the following details on a month-to-month basis (for each month).

(a) Quantum of work under each major item of work that would be carried out.

(b) Amount of resources that would be deployed (e.g. shuttering materials skilled / unskilled labour, carpenters, masons, fitters, equipment etc.)

(c) Schedule of delivery of materials to site.

(d) Approximate value of work contemplated to be completed each month.

(e) Schedule and manner in which details or materials (to be issued by the Employer) are required from the Consultant / Employer.

(f) Time periods allowed for other agencies work,

(g) Various milestones to be achieved.

This program, suitably amended after discussions with the PMC shall become binding on the Contractor. However, during the execution of the project, should it become necessary, in the opinion of the PMC to re-schedule some of the activities, the Contractor shall do so at no extra cost and / or

without any other claim.

Acceptance of a bidder’s tender does not necessarily imply acceptance of the schedule submitted and the PMC / Employer reserves to himself the right to modify / amend this schedule to suit the overall project schedule and the Contractor shall adhere to these divisions / modifications at no extra cost to the Employer.

"58 (i). **PRICE VARIATION ADJUSTMENT CLAUSE (PVA) (EXCLUDING ADJUSTMENT FOR PRICE VARIATION FOR STEEL)**

In partial modification of the stipulation that the rates quoted shall be firm and shall not be subject to any exchange variations, labour conditions, fluctuations in railway freight and any conditions whatsoever under this clause, any increase or decrease in prices of materials and labour rates shall be adjusted on the basis of the formula given below:

58(4). The price adjustment clause shall be applicable only for the work executed during the contract period including authorised extension, if any. In case the work is not completed within the contract period including authorised extension and the provision of liquidated damages has to be enforced, these adjustment clauses will not be applicable for work done during that period. It is also clarified that price adjustment clause will not be applicable to any extra variation items, the rates of which are based on prevailing market rates.

In view of the price adjustment in cost being covered as above, no other adjustments viz., increase or decrease due to statutory measures/levies, etc. will be allowed for any reason whatsoever.

In case the bill is submitted to the PMC prior to 15th of a particular month, index for that month will not be reckoned for calculating the average indices for arriving at the adjustment. If however, the bill is submitted on or after 15th, the Index for that particular month shall be taken consideration."

59. SETTLEMENT OF DISPUTE BY ARBITRATION

All disputes and differences of any kind whatsoever arising out of or in connection with this agreement or the carrying out of the works (whether during the progress of the works of within one year after their completion, or within one year after the det rmination or abandonment or breach of the contract) excepting however, on matters referred to in clause 40 of General Conditions of Contract hereof, shall be referred by either party for arbitration after giving atleast 30 days notice in writing to the o her(s) (hereinafter referred to as the 'Notice for Arbitration') clearly setting out the items of disputes for reference to a Sole Arbitrator to be appointed as hereinafter provided.

For the purpose of appointing the Sole Arbitrator referred to above, the Employer will send to the Contractor within thirty days of the Notice for Arbitration, a panel of three names of persons who shall be presently unconnected with the organisation of he Employer and the Contractor.

The Contractor shall on receipt of the names as aforesaid, select any one of the persons so named to be appointed as a Sole Arbitrator and communicate his name to the Employer within thirty days of receipt of the names. The Employer shall thereupon witho t any delay appoint the said person as the Sole Arbitrator. If the Contractor fails to communicate such selection as provided above within the period specified, the Employer shall make the selection and appoint selected

person as the Sole Arbitrator.

If the Employer fails to send to the Contractor the panel or three names as aforesaid within the period specified, the Contractor shall send to the Employer a panel of three names of persons who shall be unconnected with either party. The Employer shall n receipt of the names as aforesaid select any one of the persons name and appoint him as the Sole Arbitrator. If the Employer fails to select the person and of the panel and inform the Contractor accordingly, the Contractor shall be entitled to appoint ne of the persons from the panel as the Sole Arbitrator and communicate his name to the Employer.

If the Arbitrator so appointed is unable or unwilling to act or resigns his appointment of vacates his office due to any reason whatsoever, another Sole Arbitrator shall be appointed as aforesaid.

6. According to the Respondent, the work was delayed due to the various breaches on the part of the Petitioners as a result whereof they suffered damages on various counts. The Respondent accordingly invoked the arbitration in accordance with clause 59. The learned arbitrator made and published the said award dated 1.8.2005. Paragraph 28 of the award tabulates the various heads of claim and the corresponding amounts claimed and awarded as under :-

"28.8 **FINAL ORDERS :-**

a. The Arbitrator decides and awards to the Claimants following claims and amounts :-

Sr. No.	Short description of Claim	Amount Claimed (Rs.)	Amount Awarded (Rs.)
1.	C1- Compensation for underutilized overheads	6,47,54,039.00	4,74,96,214.00
2.	C2- Loss due to under utilized tools, plants & machineries	1,12,00,000.00	1,12,00,000.00
3.	C3- Compensation for idle material storage and blocked capital	32,00,000.00	NIL
4.	C4- Loss due to profit not earned at appropriate time	3,45,35,487.00	NIL
5.	C5- Compensation for lost productivity and efficiency	5,05,00,636.00	54,52,000.00
6.	C6- Compensation for opportunity losses	4,31,69,359.00	NIL
7.	C7- Demand due to need to restructure rates during extended period	4,64,33,892.00	1,21,08,467.00
8.	C8- Compensation for additional cost of insurance, Bank Guarantee etc.	As per actual	23,85,782.00
Inter-	Interest at 24%	As per calculation	NIL

est	from due date	
	Total Amount of Award	7,86,42,463.00

b. I decide and award that the Respondents shall pay and the Claimants shall accept an amount of Rs.7,86,42,463.00 (Rupees Seven crores Eighty Six Lacs Forty Two thousand Four hundred Sixty Three only) in full and final settlement of all the claims referred by the Claimant.

c. I award future interest on the award amount of Rs.7,86,42,463.00 from the date of publishing the award till payment of award amount. The rate of future interest to be as per the relevant law."

7. The Petitioners have challenged each of the claims awarded by the arbitrator. I will deal with the Petitioner’s case in respect of each of the claims separately.

8. Before doing so however it would be convenient to consider one of the grounds which is common to all the claims. Ms.Paranjpe submitted that the Arbitrator’s finding that the Petitioner was in breach was based on no evidence. I am unable to agree.

9. The Arbitrator has analysed the evidence in

this regard in sufficient detail. He has also considered various relevant factors while coming to this conclusion. I am unable to accept that the factors that he took into consideration were irrelevant or that the finding was patently wrong such as to warrant interference under Section 34 of the Arbitration and Conciliation Act, 1996.

(a) For instance the Arbitrator considered as important the fact that the Petitioner did not levy any liquidated damages though it was entitled to under clause 31 of the GCC. This is certainly one of the relevant factors for if, according to the Petitioner, the Respondent was in default and responsible for the delay in completing the work, it would have enforced its contractual right to levy liquidated damages. It cannot be stated that this was an irrelevant consideration.

(b) (i). In paragraph 8.9 of the award, the Arbitrator has considered some of the documents which indicate that the Respondent had applied for extension of time to complete the contract stating that the breaches of the contract had been committed by the Petitioner. In response to these applications, the Petitioner extended the contract without levying liquidated

damages and without reserving to itself the right to claim damages. This action is a relevant consideration in foisting the responsibility for the breaches. In paragraph 10.5 of the award, the Arbitrator analysed the effect of various documents and submissions of the parties on this question. The Arbitrator attached considerable importance to the minutes of the weekly/fortnightly meetings held at site on the ground that they constituted the first common record kept by the PMC appointed by the Petitioner and not by the Respondent. I am unable to find fault with the Arbitrator for having placed considerable evidentiary value on such documents for arriving at this conclusion. It is pertinent to note, as observed by the Arbitrator, that the record had been submitted by the Petitioner itself. The record pertains to the period between the 8th meeting held on 25.5.1995 and the 105th meeting held on 29.7.1998. The Arbitrator has dealt with these minutes in detail. The minutes, he held indicate that till the initial date of completion of the project, the Respondent’s progress and achievement were as per weekly/fortnightly programmes mutually agreed to between the parties and to that extend the PMC had clearly appreciated the same.

(ii). That the minutes were available only upto 29.7.1998 is irrelevant because the scheduled date of completion was only less than three months away. Thus the minutes were available for the relevant period. The evidence was therefore relevant and important on the issue of breach.

(c) The Arbitrator has also relied upon the fact that by a letter dated 2.10.1997, the Respondent had stated that the abnormal delays were caused due to the several breaches of the Respondent mentioned therein and that the Respondent had kept the Petitioner informed about the same right from August, 1995. The letter also states that the issue in this regard was raised at all the meetings. The letter concludes with a request for eighteen months extension of time stating : "this will not breach the rights of both parties for any remedy they may have under law and contract for consequence of delay." The letter no doubt is clearly relevant. The Arbitrator’s reliance upon the fact that even to this letter,the response was only an extension of time being granted without any rebuttal of the Respondent’s contention is understandable and justified.

10. In this view of the matter, it is impossible

to state that the analysis of the minutes of the meeting, the effect thereof and the finding of the Arbitrator on the question of breach mentioned in paragraph 10.6 of the award is unsustainable.

11(a) Ms. Paranjpe submitted tht the arbitrator considered drawing nos.2, 5A and 13 despite this not being tendered in evidence.

(b) The contention is not correct and required my examining the record. The minutes of the 52nd meeting held on 18.8.2004, which are not disputed, expressly record inter-alia the said drawing having been examined in respect of the issue pertaining to delay. Further the drawings were in fact on record. They were produced before the arbitrator and filed in this court. The Index to Volume II (numbered by the court) at page 208 refers to the same.

12(a) It is not necessary for the Arbitrator to record and analyze each and every letter. If the Arbitrator has ignored correspondence or documents or any other evidence which if considered would ex-facie have a bearing on the decision it may be another matter. It would of course depend on the facts and circumstances of the case.

(b) Ms.Paranjpe was unable to invite my attention to any document which clinches the issue establishing that the Arbitrator's finding was perverse, based on no evidence or contrary to the record and therefore absurd.

13. Ms.Paranjpe submitted that the Arbitrator's finding on mitigation is incorrect. It was contended on behalf of the Petitioner before the Arbitrator that the Respondent had not proved that they had mitigated the alleged losses.

14. There is some difference of opinion on the question as to on whom the onus lies to establish the mitigation of loss. It is, in the present case, not necessary to decide this question as the Arbitrator's finding on facts in this regard cannot be said to be absurd. In this regard the Arbitrator has held as follows :-

> "Mitigation does not seem to be regularly applied in construction claims for several reasons. In this particular contract, I am convinced, **nature of work was such that the mitigation was not possible risking demobilization and remobilization on one count or the other. In such**

> **contracts, it is difficult to mitigate the losses unless work is kept suspended for a specific period due to some specific hindrance.** Moreover, the conclusion of most delay claims while they are occurring cannot be accurately predicted. To mitigate a contractor needs to know when the delay will end to determine whether labour should be dismissed ; leased equipment returned and materials stored. In the present case this was not at all feasible. I accept the Claimants stand that there was never a definite programme of the Respondents as regards issuance of drawings and designs as also giving decisions on critical matters to enable the Claimants to mitigate their losses to the extent possible. Because of erratic and unplanned supply of drawings and decisions, the Claimants could never reduce their mobilization thereby they had no chance of mitigating the losses at any stage."

. The finding is certainly not absurd. It appears to be more than just reasonable. The Respondent has not established anything to the contrary.

15. The challenge to the award on this ground is therefore rejected.

. **RE : CLAIM NO.1 :**

16. Claim No.1 reads as under :-

"C-1) **COMPENSATION FOR UNDER UTILIZED OVERHEADS :**

The total contract value was Rs.43,16,93,592.00 and the job was to be done in 32 months. The workload contracted was Rs.1,34,90,424.75 per month. The amount of work done is Rs.42,08,38,634.00. Therefore the effective Time of Contract is 31 months only. The total stay on job has been 63 months and therefore the idle stay on job is 32 months. The overheads provided in this highly skilled industry is about 15% of the job i.e. @ Rs.20,23,563.71 per month. Thus we have lost benefit of overheads amounting to Rs.20,23,563.71 x 32 months = **Rs.6,47,54,039.00** and this amount may please be paid to us."

[B]. It is important to note that in the statement of claim, claim No.1 was based on the following averments :-

"Home office overhead

It is now well established that an allocable portion of a delayed contractor's home office overhead expenses is a compensable element of damage. When an engineering project is interrupted, the contractor does not realize direct billings in the time period during which they were anticipated.

As a result, home office overhead is said to be unabsorbed. Unabsorbed overhead is to be contrasted with extended costs incurred when additional work is performed. The generally accepted method for calculating unabsorbed home office overhead is the Eichleay formula.

Contract Billings Total overhead for Overhead

---------- x Contract period = Allocable to
Total billing for the contract
Contract period period

Allocable Overhead
---------- = Daily Contract Overhead
Days performance

Daily Contract Overhead x Days of Delay = Amount Claimed

> This being our major assignment, most of our office overheads are required to be booked to Owners."

17. The claim was denied by the Petitioners in their reply to the statement of claim inter-alia on the ground that the Respondent had not furnished any proof or evidence of the alleged losses. The Petitioner, it is important to note, sought a direction for production of the Petitioner's books of account. They were never produced. I have set aside the award on this ground of challenge. I will however deal with it last.

18. Firstly Ms.Paranjpe submitted that claim No.1 falls within the excepted matters and the arbitrator accordingly had no jurisdiction to deal with the same. She based the submission on the premise that claim No.1 falls within clauses 2-a and 2-e of the General Conditions of Contract which in turn are excepted

matters under clause 59 pertaining to arbitration. I have earlier reproduced these clauses. I am unable to agree.

19. The arbitrator had, under clause 59 of the SPC jurisdiction to decide all disputes and differences arising out of or in connection with the agreement "excepting however, all the matters referred to in clause 40 of the General Conditions of Contract."

20. Clause 40 provides that the PMC's decision, opinion, direction, certificates (except any payment) with respect inter-alia to the matters under clause 2 shall be final and conclusive and binding on the parties and shall be without appeal. Clause 2, is expressly referred to as one of the "excepted matters" in Clause 40. The question that arises therefore is whether claim No.1 falls within the ambit of clause 2 and is thereby not arbitrable in view of clause 59 of the SPC read with clause 40 of the GCC.

21. Clause 2 merely provides that the contractors shall carry out and complete the work inter-alia "in accordance with the directions of and to the satisfaction of" the PMC. Obviously the discretion

granted in clause 2 to the PMC pertains to issuance of further drawings and/or written instructions, details, directions and explanations inter-alia in regard to the variation or modification of design, quality or quantity of works or addition or omission or in substitution and postponement of any work to be executed under the provisions of the contract.

22. Ms.Paranjpe submitted that the PMC having been authorised to issue such instructions implied that such instructions were necessitated due to the default of the Petitioners. The Respondent was therefore debarred from making any claim on account of delay which may have occurred thereby.

. The submission is not well founded.

23. Clause 2 does not authorise or require the PMC to decide which party was in default and/or as to on account of which of the parties the project was delayed. The PMC was authorised to issue such instructions de-hors the question of default. In other words, the PMC was entitled to issue instructions for any reason whatsoever.

24. Ms.Paranjpe’s submissions would have been well founded had clause 2 provided that the PMC would

decide whether or not the delay was occasioned as a result of the acts/conduct of the parties. Had there been any such clause and had the PMC come to the conclusion that the Respondent was responsible for the delay, the arbitrator would have been precluded from going into the question himself. This is for the simple reason that this question itself would have been within the purview of the PMC and thereby an excepted matter under clause 40.

25. In the circumstances the challenge to claim No.1 on the ground that it was based upon an issue which was an excepted matter is rejected.

26. This ground of challenge was common to all the claims, as Ms.Paranjpe submitted that, the basis of all the claims was that the Petitioners were responsible for the delay in the execution of the work. This submission was therefore advanced by Ms.Paranjpe in respect of each of the claims that she challenged. This submission qua the other claim is also therefore rejected.

27. Secondly Ms.Paranjpe submitted that the above contention though raised by the Petitioners was not decided by the arbitrator. The award therefore is

according to her bad on the ground that the arbitrator has not furnished reasons on this aspect.

28. It is for the arbitrator to interpret a clause. It is his duty to do so. If the clause is susceptible to more than one interpretation the Court in a challenge to the award would not normally substitute its interpretation for that of the arbitrator. The award then cannot be assailed. However if the arbitrator does not interpret or construe a clause which requires to be construed or interpreted and the award is dependent upon such construction or interpretation, it would be possible to challenge the award on that ground. For in that event, the party challenging the award could well contend that had the arbitrator interpreted the clause in the manner submitted by him, the arbitrator could well have held differently.

29. The question of such a challenge would however arise only when a clause requires interpretation, to wit the clause is capable of more than one interpretation. That however is not the case here at all. Clauses 2 and 40 of the GCC require no analysis. They are clear. They can be interpreted in only one manner viz. that they do not bar the

authority of the arbitrator to decide a question as to which of the parties was responsible for the delay in the project. In other words, clauses 2 and 40 of the GCC do not invest the PMC with the authority to decide which of the parties is responsible for the delay.

30. When a clause is capable of only one interpretation, even if the arbitrator does not in his award interpret the same, it would not warrant setting aside the award on the ground that no reasons on this aspect were furnished. To hold otherwise would lead to an absurdity. It would really amount to saying that the arbitrator could only have interpreted the clause in one manner but merely because he did not say so in the award, the award ought to be set aside.

31. Ms.Paranjpe’s submission that the award ought to be set-aside because the arbitrator did not expressly interpret clause 2 in the award, is rejected.

32. Thirdly Ms.Paranjpe submitted that a claim for compensation on account of any breach on the part of the Petitioners was barred under clause 8 of the SPC. The submission is not well founded.

33. The clause merely permits the PMC to do two things. Firstly the PMC may "suitably amend" the programme furnished by the contractor/Respondents. Secondly it permits the PMC to reschedule some of the activities. The right to modify/amend the schedule submitted by the contractor is qualified namely "to suit over all project schedule". The project schedule was clearly of thirty two months as I shall demonstrated later. This clause clearly did not permit the PMC to modify/amend the scheduled period stipulated in the contract. The PMC's right to reschedule the activities under clause 8 of the SPC is necessarily confined to the period stipulated in the contract.

34. Clause 8 in my opinion is capable of only this interpretation and no other interpretation. Indeed the learned arbitrator has so construed clause 8 in the award. Paragraph 10.3 of the award in general and sub-clause (c) thereof in particular is relevant in this regard and reads as under :-

> (c). "To reinforce their argument that the contract period was never stipulated as a fixed period of 32 months, the Respondents have relied on provisions of Clause No.SPC-8 of contract document under the heading "Programme of Work". Interpreting

> this provision the Respondents aver that the Claimants contention that the contemplated period of completion was 32 months is misconceived in fact and in Law. Therefore the Respondents have denied firmly that the time period of 32 months for completion of the work can be said to be binding on the Respondents. But careful interpretation of this contract clause itself does not corroborate with the Respondents contention that there is no fixed contract period for this contract. I bring out the relevant portion of this clause hereunder. "Acceptance of bidder's tender does not necessarily imply acceptance of the schedule submitted and PMC / Employer reserves to himself the right to modify / amend this schedule to suit the overall project schedule. In this case overall project schedule stipulated by the Respondents themselves (Exh.R1) is of 32 months. Therefore I am of the firm opinion that the contract was for a predetermined contract period of 32 months." (emphasis supplied)

35. Fourthly Ms.Paranjpe submitted that the learned arbitrator's finding that the contract contained a time limit is ex-facie unsustainable. I do not agree.

36. Indeed it would have been surprising had the arbitrator come to a conclusion to the contrary. That time was not and in any event ceased to be of the essence of the contract does not support this

submission either.

37. The arbitrator has considered in detail and rightly rejected the Petitioners' contention that there was no fixed time for completion of the contract and that time for completion of the work was at large.

(a). The arbitrator considered the fact that the work order dated 21.2.1995 specifies the period of completion in paragraph 3.2 which reads as under :-

> "3.2 Period of completion :
>
> The entire work as described in the tender shall be completed by you within a period of 32 (Thirty two) months from the date of commencement of the work which shall be reckoned from the date of issue of the Work Order or from the date of handing over of the site to you, whichever is later. The period for completion shall be inclusive of the intervening monsoons."

(b). The learned arbitrator also referred to the fact that clause 10 of the agreement itself expressly specified that the contractor should complete the entire work within thirty months. Clause 10 reads as under:-

> "10. Time shall be considered as the essence of this Contract and the

> Contractor hereby agrees to commence the work within 21 days from the date of Work Order or handing over of the site, whichever is later, and shall complete the entire work within 30 months subject nevertheless to the provisions of extension of time as contained in the said conditions."

(c). Having referred to the aforesaid clauses, the arbitrator concluded in paragraph 10.3(b), as under :-

> "10.3(b) Even at the stage of invitation of tenders and entering into contract, the concept of fixed time contract was very much accepted by the parties and it is my firm opinion that the Claimants submitted their bid based on the fixed contract period. The contents of the contract signed on 15th of May 1995 also supports this conclusion that the contract was based on fixed contract period vide Para 10 of B-3 as also Para 5 of A-2 of Contract document."

(d). I have already extracted the arbitrator’s conclusion in paragraph 10.3 (c) of the award.

(e). Thereafter the arbitrator has referred in paragraph 10.3 (d) of the award to the various letters and communications between the parties which clearly show that the contract stipulated a period of 30/32 months for completion of the work. Even the architects vide their letter dated 7.11.1997 recorded

as under :-

> **"You are aware that a contract for construction of Head Office Building Project was awarded to you by M/s.NABARD which was to be completed by 7th November, 1997."** (emphasis supplied)

38. In the circumstances, it is impossible to hold that the arbitrator's finding that the contract stipulated a period of thirty two months for completion of the work is absurd or unsustainable. In fact a view to the contrary would have been unsustainable.

39. Fifthly, Ms.Paranjpe submitted that the finding of the arbitrator that the Petitioners were responsible for the contract being delayed beyond the stipulated period was patently absurd and that the award was liable to be set aside on this ground. According to her, the award contained a major contradiction. The contradiction according to Ms.Paranjpe is in paragraph 10.5(b) of the award where the arbitrator observed as under :-

> "10.5(b). Till the initial date of completion of the project (07.11.1997) the Claimants progress and achievements were as per the weekly / fortnightly programmes mutually agreed between the parties

> and to that extent the PMC has clearly appreciated this aspect at that time."

40. Ms.Paranjpe submitted that the finding that the Petitioners were responsible for delay in the execution of the work is contrary to the finding that the weekly/fortnightly programmes were amicably agreed upon. I am unable to agree.

41. As I have already indicated, under the terms and conditions of the contract and in particular clause 2 of the GCC and clause 8 of the SPC, the PMC was entitled to issue instructions including postponement of any work under the contract to the contractor. Under clause 8 of the SPC, the PMC was entitled to modify/amend the schedule furnished by the contractor. The contractor was bound to comply with such instructions. The mere fact therefore that the contractor agreed to the instructions furnished by the PMC would not militate against the finding that the Petitioner was responsible for the delay. Nor would the finding amount to the Respondents waiving their right to damages occasioned by such instructions.

42. The arbitrator’s findings in paragraph 10.6(c) of the award that the Petitioners had

committed breach of the contract are therefore not contradictory to the arbitrator's finding in paragraph 10.5(d) of the award.

43. The sixth ground of challenge to claim No.1 is that the same is contrary to the arbitrator's finding with respect to claim No.6 which was rejected inter-alia on the ground that it was remote and not proved. Claim No.6 was for compensation for opportunity losses. The claim appears to be for loss of profits which is distinct from the claim for compensation for underutilized overheads. The challenge to claim No.1 may have had substance if claim No.6 had been awarded, for in that event it would have been possible to argue that it is covered by the award of claim No.6.

44. This brings me to the ground of challenge to the award in respect of claim no.1 which I have upheld. Ms. Paranjpe submitted that the award was passed on no evidence. She further submitted that the arbitrator had also failed to furnish any reason for the award in respect of claim no.1. Both the submissions are well founded.

45(a). I have set out the relevant portions of the

statement of claim earlier. It is important to note at the outset that the positive case of the respondent was on the basis that "the generally accepted method for calculating unabsorbed home office Overhead is the Eichleay formula". The respondent then set out the formula. The formula requires various party specific details such as the total billing for the contract period and the total overhead for the contract period.

(b) It is admitted that there was not an iota of evidence in this regard. In other words, the components required to work the formula were absent. Thus the respondent went to arbitration on a particular basis and failed totally to establish not only the claim but even to produce the material necessary to establish the claim. Mr. Parekh admitted that despite request the books of account of the respondent were not produced.

46. The relevant portion of the statement of claim ends by the respondent stating this being their major assignment, most of the office overheads ere required to be booked to the petitioner. However, as noted above, even the details of the office overheads were not produced. Thus it is established beyond doubt now that the respondents had failed to produce any

evidence whatever to establish claim no.1 on the basis of which it was made.

47. It is a settled law that an award based on no evidence is unsustainable. In Bharat Coking Coal Ltd vs.L.K.Ahuja reported in (2004) 5 SCC 109 the Supreme Court held that in the absence of any evidence, the arbitrator could not have awarded the same. The Supreme Court held that this aspect was well-settled in the case of Sunley (B) and Co.Ltd vs. Cunard White Star Ltd reported in (1940) 2 AER 97 (CA) by the Court of Appeal in England. In Bharat Coking Coal Ltd (supra) the Supreme Court held that :

> 24. Here when claim for escalation of wage bills and price for materials compensation has been paid and compensation for delay in the payment of the amount payable under the contract or for other extra works is to be paid with interest thereon, it is rather difficult for us to accept the proposition that in addition 15% of the total profit should be computed under the heading "□Loss or Profit." It is not unusual for the contractors to claim loss of profit arising out of diminution in turnover on account of delay in the matter of completion of the work. What he should establish in such a situation is that had he received the amount due under the contract, he could have utilised the same for some other business in which he could have earned profit. Unless such a plea is raised and established, claim for loss of profits could not have been granted. In this case, no such material is available on record. In the absence of any

> evidence, the arbitrator could not have awarded the same. This aspect was very we l settled in Sunley (B) & Co. Ltd. v. Cunard White Star Ltd.5 by the Court of Appeal in England. Therefore, we have no hesitation in deleting a sum of Rs. 6,00,000 awarded to the claimant."(emphasis supplied)

48. The statement of claim in the concluding part merely states "overheads provided in this highly skilled industry is about 15% of the job." The respondent has not even stated the actual overheads in their case. The respondents were obviously in possession of evidence in this regard. They consciously decided/chose not to produce the same. The statement of claim contains a bald averment to the above effect which admittedly was not even sought to be established.

. This is how the arbitrator has dealt with such a large claim backed by no evidence whatsoever:-

> **"CLAIM NO. C1 :-**
>
> **Claim of compensation for under utilized overheads :-**
>
> Parties have identified requirement of overheads in bid documents which is not disputed by the Respondents considering the specialized nature of work involved, the work needs closer supervision and extra expenditure on overheads etc.
>
> I hold that claim for average 12% of cost of work on overheads on this work claimed by the

> Claimants for both site overheads and head office overheads as a reasonable cost.
>
> $$43,46,46,795.70 \times \frac{12}{100} \times \frac{29}{32} = \text{Rs.}4,74,96,214.00$$
>
> Thus I award Rs.4,74,96,214.00 towards Claim C1.

49. Firstly, it is now not only established but admitted by the respondent that the arbitrators first statement that the parties had identified the requirements of overheads in the bid documents is incorrect. The further statement that the petitioners did not dispute the same is equally incorrect. There is not one sentence, not one clause in the bid documents or in the agreement or in the terms and conditions incorporated therein which refers to any requirements of overheads. Mr. Parekh fairly concedes the same. It is also established that there is nothing either in the bid documents or any other contract documents which even remotely indicates any reference to such requirements.

50. These facts coupled with a total absence of evidence establishes that there was no material whatever produced before the arbitrator to enable him to compute the amount paid under claim no.1.

51. The Arbitrator proceeds to award claim no.1 on the basis of 12% being the claim for average cost of work. Here too there is nothing to establish the percentage on the basis of which the arbitrator calculated claim no.1. I fail to understand how and on what basis the arbitrator awarded claim no.1. On the basis of the record Mr. Parekh was unable to indicate a shred of evidence which would support the award.

52. Equally well founded I find Ms. Paranjpe's submissions that the award contains no. reasons in respect of claim no.1. I am unable to decipher any reasons in the award in respect of claim no.1. Mr. Parekh was unable to indicate anything in this regard either from the award.

53. In acdermott International Inc. vs. Burn Standard Co.Ltd and Ors. decided on 12.5.2006 in I.A.Nos. 2-3 in Civil Appeal No.4492 of 1998 the Supreme Court held as under :

> 37. Another important change which has been made by reason of the provisons of the 1996 Act is that unlike the 1940 Act, the Arbitrator is required to assign reasons in support of the award. A question may invariably arise as to what would be meant by

a reasoned award.

38. ‘In Bachawat’s Law of Arbitration and Conciliation, Fourth Edition, pages 855-856, it is stated :

...Reason is a ground or motive for a belief or a course of action, a statement in justification or explanation of belief or action. It is in this sense that the award must state reasons for the amount awarded. The rationale of the requirement of reasons is that reasons assure that the arbitrator has not acted capriciously. Reasons reveal the grounds on which the arbitrator reached the conclusion which adversely affects the interests of a party. The contractual stipulation of reasons means, as held in Poyser and MIlls’ Arbitration In Re, "proper, adequate reasons". Such reasons shall not only be intelligble but shall be a reason connected with the case which the court can see is proper. Contradictory reasons are equal to lack of reaons.

The meaning of the word "reason" was explaned by the Kerala High Court in the context of a reasoned award...

"Reasons are the links between the materials on which certain conclusions are beased and the actual conclusions....

A mere statement of reasons does not satisfy the requirements of Section 31(3). Reasons must be based upon the materials submitted before the arbitral tribunal. The tribunal has to give its reasons on consideration of the relevant materials while the irrelevant material may be ignored.....

Statement of reasons is mandatory requirement unless dispensed with by the parties or by a statutory provision.

54. The arbitrator has proceeded to award an amount of almost Rs. 5 crores without even indicating the basis on which he has done so. He has not even

indicated any reasons why he has not considered the basis on which the respondent made the claim. The award therefore fails for having not complied with the mandatory requirements of furnishing reasons.

55. Mr. Parekh sought to overcome this difficulty in various ways. Firstly, he submitted that claim no.1 by its nature is not capable of quantification. He cited several judgments in support of his contention that merely because it is difficult to compute damages, the court is not bound to reject the same. Some amount of guess-work is required. According to him, even in the absence of evidence, the arbitrator was entitled even on the basis of guesswork to award some amount. I am unable to agree.

56. The submission is not well founded. This was not the respondents case at any stage of the arbitration proceedings. It certainly was not the respondents case in the statement of claim. On the contrary in the statement of claim the respondent proceeded on the basis that the claim can be quantified. The respondent referred to the Eichleay formula. Having done so, the respondent failed to produce any evidence to establish the same.

57. This submission is contrary to the judgment of the Supreme court in the case of Bharat Coking (supra). It is opposed to every principle of law. To uphold this contention would lead to extremely dangerous consequences. It would permit arbitrariness on the part of decision making bodies authorities including arbitrators.

58. Mr. Parekh sought to support this contention by relying upon four judgments. None of the judgments however, support this contention.

59. Mr. Parekh relied upon the following observation of a Learned Single Judge of the Calcutta High Court in the case of **Gambhirmull Mahabirprasad vs. The Indian Bank Ltd and anr. reported in AIR 1963 Calcutta 163 (V 50 C 36)** wherein in paragraph 66 the court held as under :

> (66) The fact that damages are difficult to estimate and cannot be assesed with certainty or precision does not relieve the wrongdoer of the necessity of paying damages for his breach of duty, and is no ground for warding only nominal damages. A distinction must be drawn, however, between cases where the difficulties are due to uncertainty as the causation of damages, where questions of remoteness arise, and cases where they are

> due to the fact that assessment of damages cannot be made with any mathematical accuracy. Lack of relevant evidence may make it impossible to assess damages at all, as where the extent of the loss is dependent upon too many contingencies, and in such cases, where the liability is established, nominal damages only may be awarded. Where it is established, however, that damages has been incurred for which a defendant should be held liable the plaintiff may be accorded the benefit of every reasonable presumption as to the loss suffered. Thus the court, or a jury doing the best that can be done with insufficient material, may have to form conclusions on matters in which there is no evidence, and to make allowance for contingencies even to the extent of making a pure guess, this is of common occurrence in claims made, for example, in respect of pain and suffering, loss of expectation of life, and the loss of a chance of winning a price; Halsbury's Laws of England, 3rd Edition, Vol.11, page 226 Article 394.

60. This judgment is also clearly distinguishable. It was not even the respondents case that it was difficult to compute the claim. Infact, as stated above, the respondents went to trial on the basis that the claim can be established but produced not an iota of evidence to establish. This is not a case of insufficient material. This is not a case where damages cannot by the virtue of the nature of claim cannot be assessed. It clearly could have been but the claimant sought not to. The cases where the court makes a pure guess-work such as while computing the damages for pain and suffering, loss of

expectation of life and the loss of a chance of winning a prize are altogether different from claim such as the one under consideration.

61. Mr. Parekh relied upon the judgment of the *Tai Hing Cotton Mill Ltd vs. Kamsing Knitting Factory (A Firm) (1979) AC 91 (P.C.).* The appellants had committed breach of contract by refusing to deliver the contracted goods. The Privy council construed the Hong Kong Sale of Goods Ordinance on the question of damages and held that the measure of damages would be the estimated loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract. The difficulty was that the buyers had based their case on the market price of goods at a particular date which was not accepted. The evidence of the market price on the correct date was held to be minimal. It was further contended that the buyer failed to prove the loss and the damages should therefore be nominal. Their Lordships rejected the contention inter-alia on the ground that there was evidence of the market price on the date of the breach, that there was evidence of the fact that the market price thereafter fell steadily and that it was apparent that the buyer had suffered substantial loss. However the material to enable it to be precisely

quantified was lacking. Instead of ordering a retrial, their lordships came to the conclusion that the ends of justice would be best served by their fixing a new figure of damages as best they can upon the available evidence, such as it was.

62. Thus it is clear that this was not a case of there being no evidence whatever. There was evidence of the price at a particular time and of the fact that the market was falling. It is also important to note that the Privy Council computed the damages on the basis of the buyer being prepared to accept the price on the relevant date. Thus this was an additional factor which enabled their Lordships to compute the damages.

63. This judgment is clearly therefore distinguishable from the facts of the present case. The judgment does not deal with a case where there was a total absence of evidence. The judgment does not hold that in cases of total absence of evidence the court is entitled to award any sum arbitrarily. Moreover in the present case, the respondent infact went to trial on the basis that it was in a position to quantify the claim but failed to do so.

64. Mr. Parekh then relied upon the judgment of the Privy Council in the case of **A.V.Joseph vs. R. Shew Bux reported in A.I.R. 1918 Privy Council 149.** The action was brought for damages for not taking delivery of a quantity of sleepers. The Chief court on Appeal found in favour of the plaintiff but came to the conclusion that the plaintiff had not given sufficient evidence and therefore came to the conclusion that the plaintiff can get nothing but nominal damages. This was not the case of absence of any evidence either. The Evidence was given in respect of various components. Their Lordships held that even after making deductions of certain items the plaintiff would have been entitled to some damages and in such circumstances to reduce the claim to Rs.1/- would be incorrect. It is pertinent to note that it was observed that there was an element of uncertainty which might have made it desirable that the matter should have been sent back to inquiry but neither counsel pressed for that in view of the expenses involved therein being disproportionate to the claim. Their Lordships without dissent of counsel took it upon themselves to compute the damages. They did so on the basis of the evidence led by the parties which is clear from page 151 of the report.

65. Lastly Mr. Parekh relied upon the judgment of the Supreme Court in the case of *K.Narendra vs. Riviera Apartments (P) Ltd reported in 1999 5(SCC) 1977.* In this case specific performance was refused. The Supreme Court, however, considered it to be a fit case where the respondent/plaintiff should be awarded some compensation. Mr. Parekh relied upon the following observations.

> 38. However, in our opinion the present one is a fit case where the respondents should be awarded some compensation in spite of its specific performance being refused. Section 21 of the Specific Relief Act provides for award of compensation either in add tion to or in substitution of such performance. The explanation appended to the section expressly enacts that the court is not precluded from exercising jurisdiction to award compensation even in a case where the contract has been rendered incapable of s ecific performance. Compensation to some extent is a matter of guesswork. An amount of RsÂ 3,25,000, equivalent to the amount which was paid by the respondents to the appellant would be a reasonable amount of compensation in the facts and circumstances o f the case which in our opinion deserves to be paid by the appellant to the respondents in substitution of the decree for specific performance. The respondents have also in their plaint claimed the relief of compensation in addition to other reliefs.

66. Infact the judgment is against Mr. Parekh's submission. The Supreme Court observed that compensation "to some extent" is a matter of guesswork. I do not read the judgment as an authority

for the proposition that absolute guesswork is permissible. Even on the question of guesswork it will depend upon the facts and circumstances of each case. The amount awarded by the Supreme Court was not based on absolute guesswork. The figure was infact derived on the basis of the record before the Supreme Court.

67. Mr. Parekh relied upon the commentary in Gagria's Law relating to Building and Engineering Contracts in India Page 633 to 638 under the heading "I-Head office Overheads- Profit". The author notes that Head Office Overheads-Profits vary from contractor to contractor. As observed earlier, the respondents had not established the percentage levied by them. They have clearly not stated the same. Only a general observation is made as to the alleged practice.

68. The author then refers to the recommendation of the Government of India, Ministry of Irrigation and Power published in January 1956 regarding the percentage of overheads in the estimates to be prepared by the various departments of the government. For overheads the percentage suggested is 10%.

69. Firstly this is not the basis on which the respondent based its claim in the statement of claim. There is nothing to indicate that this is the basis on which the respondent sought to establish the claim before the arbitrator. The publications are of the year 1956 i.e. over 50 years ago. The same were not even produced before the arbitrator. The arbitrator has therefore not relied upon. It would be grossly unfair to the petitioner to permit the complete lack of evidence and the absence of reasons to be filed in by counsel in proceedings challenging the award.

70. It would be contrary to the principles of natural justice to permit the absence of evidence by a claimant and the absence of reasons by an arbitrator to be supplanted by evidence produced in proceedings challenging the award on those grounds. This for the obvious reason that the other party who did not have notice of either the said evidence or even the basis for estalishing the claim unable to deal with the same.

71. Mr. Parekh relied upon the following approach in Chitty on Contracts 29th Edition Volume I on page 1427

> **Difficulty of assessment.** The fact that damages are difficult to assess does not

> disentitle the claimant to compensation for loss resulting from the defendant's breach of contract. Where it is clear that the claimant has suffered substantial loss, but the evidence does not enable it to be precisely quantified, the court will assess damages as best it can on the available evidence. Similarly the fact that the amount of that loss cannot be precisely ascertained, as, for example, where it depends on a contingency, does not deprive the claimant of a remedy. Where, if the defendant had fully performed his undertaking, there was only a chance that the claimant would acquire a benefit or make a profit, the court will discount the damages to reflect the likelihood that the benefit or profit would have been received. The loss of profits suffered by a claimant as the result of the defendant's breach of contract frequently depends on many speculative factors, but the courts will always attempt to assess the amount of loss.

72. The commentary is of no assistance to the respondent. It was not the respondents case before the arbitrator that there was any difficulty in assessing the compensation. Nor is this a case where there was evidence but the same did not enable the arbitrator to quantify the same precisely. This is a case of no evidence being produced deliberately despite evidence being available. The commentary it must be noted is to the effect that the court has in such cases assessed the damages as best it can on the available evidence. Infact the last sentence is against the petitioner for it recognises that court will always attempt to access the amount of loss.

73. More important however is the fact that these are grounds of challenge in a petition challenging the award. None of these was however pleaded by the respondent before the arbitrator. The respondents did not contend that there was any difficulty in assessing the damages. The respondents did not invite the arbitrator to indulge in any guess-work. The respondent did not adduce any evidence on the basis whereof, the arbitrator had a point of reference. These arguments are only an after-thought. For these reasons I do not find the commentary in Pollock and Mulla, Indian Contract Act and Specific Reliefs Act, 12th Edition, Volume-II, Page 1501 to be of any assistance to the respondent.

74. Mr. Parekh then submitted that despite the fact that there are no reasons and no evidence the award in respect of Claim no.1 was sought to be upheld as the arbitrator appointed was an expert.

75. As before the matter was fully heard my assignment had changed, I did not treat it as as part-heard. After the arguments were almost concluded Mr. Parekh had tendered an affidavit stating that the same was only to furnish evidence regarding the

expertise of the arbitrator. I have accepted this affidavit subject to all the rights and contentions of the parties.

76. Mr.Parekh had also tendered an affidavit which he stated annexes the audited Profit and Loss Accounts of the respondent. He submitted that the same was being filed only to establish the futility in remitting the matter to the arbitrator for consideration of the evidence. He submitted that he did not by these annexures seek to establish the facts in the present proceedings. He submitted that it will be futile to remit the matter to the arbitrator because on the basis of the said account the arbitrator was bound to award the claim as made.

77. Firstly I do not intend remitting the matter to the arbitrator. Secondly assuming that the matter was remitted to the arbitrator there would be no question of the arbitrator accepting the accounts without permitting the other parties to challenge the same. There is no presumption that the Profit and Loss Accounts of a party are conclusive proof merely because they are audited. The other party is always entitled to challenge the same. The affidavit seeks to fill in the total lack of evidence which cannot be

done in the present proceedings. In the circumstances the second affidavit is rejected.

78. The submission that the arbitrator was entitled to make an award despite the absence of evidence on the ground that he was an expert arbitrator is clearly an after-thought. The parties clearly did not submit to his arbitration on this basis. The arbitration clause itself does not contemplate or require the appointment of an expert as an arbitration. The only qualification prescribed therein is that the arbitrator must be a person " unconnected with the petitioners and the respondents". Further the petitioners in accordance with Clause 59 forwarded to the respondent a list of three persons, one of whom was a retired Chief Justice of India. This indicates that the petitioners themselves did not consider the reference as being to an expert. The mere fact that the respondent selected from the list an Engineer would not establish that the reference was to him as an expert.

79. The normal rule is that a claim must be supported by evidence. Parties expect a claim to be awarded against them on the basis of evidence. An award based on no evidence is unsustainable. Indeed

the nature and the quantum of evidence may vary in arbitration proceedings from those before civil courts. To displace this normal rule, the first condition ought to be that the parties are ad idem that the reference is to an expert and that it may not be necessary therefore for evidence to be produced in respect of matters of which he is an expert and therefore deemed to have adequate knowledge.

80. There may arise a situation where a court can legitimately infer that the parties by their conduct or otherwise agreed to the reference being to an expert arbitrator. This may be so in cases where for instance the arbitrators are selected from a particular trade organisation. This however is not a case before me. As I have noted earlier neither Clause 59 nor the list of arbitrators furnished by the petitioners indicates the same.

81. Further, admittedly the arbitrator in the present case was an expert in the field of engineering. The quantification of Claim No.1 does not involved any expertise of the arbitrator as an engineer. Claim no.1 involves to the computation of the loss that may have been suffered by the respondent on account of the breaches on the part of the

petitioners. Anybody who has anything to do with such contracts knows that there are atleast two distinct aspects while tendering for and in the working of a contract,- the technical and the financial fields. The financial aspects of a contract are entirely different from an engineering aspect. It is not necessary that every engineer would be familiar with the pricing of the contract and the financial aspects thereof.

82. In the present case, the respondent has established that the arbitrator was an expert in the field of civil engineering. In paragraph 29 of the affidavit-in-reply all that is stated is that the arbitrator is an expert in the field of Civil Engineering. It is stated that the petitioner and the respondent expected the arbitrator to utilise his general expertise for the purpose of determining the disputes and for the purpose of shortening the evidence and arguments *on technical aspects.* Even assuming that what is stated therein is correct, which in fact it is not, it is crucial to note that it is not even the respondent’s case that the arbitrator had any knowledge or expertise in project financing.

83. This was pointed out to the respondents

during the course of the argument. They therefore filed the further affidavit annexing thereto the Arbitrator's curriculum vitae. The learned arbitrator has fairly referred to his expertise only in the field of engineering. It is an extremely elaborate curriculum vitae. It indicates the learned arbitrator expertise in planning, designing and executing major building works. The learned arbitrator has fairly not even remotely suggested that he had in any of these innumerable projects anything to do with project financing and the financial aspects whatever. Nor does he say that in the course of his work he was at all familiar with project financing or the manner in which profits are computed or provided for by the contractors.

84. Thus even on the facts of this case there was no question of the arbitrator using any expert knowledge while awarding Claim no.1. In this view of the matter, it is not necessary to consider the various judgments cited by Mr.Parekh regarding the scope and power of expert arbitrators.

85. Ms. Paranjpe contended that even if the award in respect of Claim no.1 is to be upheld and the formula adopted by the Arbitrator is applicable then

the figure of Rs.41,03,67,928.56/- ought to be applied. This she stated was in view of the fact that by a supplementary agreement dated 26.12.1977 the contract amount stood reduced to this figure. On that basis the amount awarded would in any event stand reduced to Rs.4,46,27,512/-. Mr. Parekh, did not dispute the fact that the figure adopted by the arbitrator ought to have been modified. He however contended that the figure should be the actual amount work done which was Rs.42,05,770/-.

86. As I have decided to set aside the the award in respect of Claim no.1 it is not necessary to decide this issue.

Re: CLAIM NO.2

87. The claim was in respect of compensation for loss due to underutilized tools, plant and machinery. The Respondent contended that as a result of the delay in the work, their tools, plant and machinery were lying ideal. The Respondent claimed an amount of Rs.3,50,000/- per month for the extended period of 32 months i.e. an aggregate of Rs.1,12,00,000/-.

88. The quantum was sought to be enhanced by

virtue of an amendment which was rejected. I will deal with the amendment shortly. Suffice it to note at this stage that the arbitrator granted the original claim i.e. Rs.1,12,00,000/- despite his coming to the finding that the amount payable to the Respondent would be Rs.3,67,45,022/-. The Respondent however has not challenged the award.

89(a). The arbitrator observed that the Respondent had submitted the rates and charges for the machinery on the basis of the schedule of rates of the PWD, Mechanical Circle and that the original copy of the schedule was made available to the Petitioner for verification and comments.

(b). He further observed that the Respondent had submitted two compilations viz. Vols. C12 and C12(c). Part C2 of Vol.12 contained details regarding the utilisation of tools and plant giving specific time schedule for utilisation of each machine. Thus far, no interference is called for with the award.

(c). The computation of the period of utilisation of the equipment was made by the arbitrator on the basis of the records and arguments submitted before him. This would be a pure question of fact.

(d). The arbitrator also held that Vol.C12(c) had been submitted by the Respondents and that the same was given to the Petitioner for inspection and comments. The details were as per the schedule of the PWD, Mechanical Circle, which contains the details of the cost analysis of hire charges of different equipment. The learned arbitrator accepted the rates mentioned in the PWD Schedule as he thought the same to be reasonable. This again is a question of appreciation of evidence which does not warrant any interference.

90. Thus, based on the information pertaining to the actual utilisation of the equipment and the rates based on the PWD Schedule, the arbitrator calculated the loss suffered by the Claimant on this count in respect of Claim No.2. The method of calculation is logical and has been set out in great detail pursuant to a tabulation made by the arbitrator in the award itself.

. Indeed, if the contents of Vol.C12 are to be followed, no fault can be found with the award.

91. Ms.Paranjpe, however challenged the award in

respect of Claim No.2 on the ground that Vol.C12 had been rejected. In other words, according to her, the award was based on the contents of documents which not only did not form a part of the record but had been expressly rejected by the arbitrator.

92. The submission is not well founded. The nature of this submission necessitated a consideration of the record. The Respondent, as stated above, sought to amend the statement of claim by enhancing the claim inter-alia, in respect of Claim No.2. The learned arbitrator held that the same did not change the basis of the claim. Nevertheless, he held in a decision contained in his letter to the parties, dated 24.12.2003:

. "The revised submission could be argued as part of evidence but must be rejected as an up-date of Revision".

. In paragraph 2, he held :

> "(2) It is therefore directed that parties should deem original claims as the only "reference" and the amounts of the original claims only would survive for adjudication and that alone would constitute frame of reference. Parties should proceed

with the case on this direction."

93. The order contained in the letter dated 24.12.2003 was clarified by a further order dated 16.1.2004 where the arbitrator held :

> "2. It was confirmed that in view of rejection of claimants application for revision, their revised/amended claims would be ignored alongwith revised/added evidence, etc.,"

. It is important to note however that the arbitrator permitted the Respondent to submit additional evidence and computation in support of Claim No.2 but clarified that this evidence would be confined only to the claim as originally made and not to the enhanced claim. The Respondent was directed to submit the additional Exhibits/evidence by 16.2.2004 and the Petitioners were directed to submit their additional Exhibits/evidence by 1.3.2004.

94. Thereafter, the Petitioner made an application dated 1.3.2004 calling upon the arbitrator to reject Vol.C12 and, in the alternative, in the event of Vol.C12 being taken into consideration, to direct the Respondent to grant inspection to the Petitioner of the originals books/publication of the data referred

to in Vol.C12 and to prove the contents thereof.

95. In the minutes of the hearing held before him on 3.3.2004, the arbitrator noted that Vol.C12 had been taken on record. Paragraphs 5, 6 and 7 of the minutes are important and read as under :

> "5. Ld.Counsel for the Respondents requested that the original books and Publications be made available to them for proper study & verification in respect of submission from page Nos. 21 to page No.29 of Vol C-12. Arbitrator agreed and directed the Claimants to do the needful at the earliest."
>
> "6. After proper verification of these documents, the Claimants have agreed to submit the detail computation of Claim C2 which is claimed at 3.50 lakhs per month totally aggregating to Rs.1.12 Crores."
>
> "7. Ld.Counsel for the Claimants Mr.Dave, confirmed that he has already advanced his arguments in respect of alleged idling period in respect of claim C2 and he will not like to add anything to it. He will, however, advance his arguments about quantification part of claim C2 (Rs.3.50 lakhs per month) after verification of original documents as mentioned above."

96. The above documents were made available to the Petitioners. It is clear therefore that the Petitioners themselves considered Vol.C12 as having

been taken on record by the arbitrator. It is for this reason that the Petitioner made an application as recorded in paragraph 5 of the minutes that the original books and publications shall be made available to them for proper study and verification of page nos.21 to 29 of Vol.C12. It is important to note that this was, in fact, the alternative prayer in the Petitioner's application dated 1.3.2004.

97. Ms.Paranjpe's submission that the minutes only suggested that inspection was to be taken by the Claimants and that the documents were not taken on record, is not well founded. The reading of the minutes as a whole indicates clearly that the documents had in fact been taken on record. It was for the arbitrator to decide the admissibility thereof. Indeed, these were copies of documents containing, inter-alia, the schedule of rates accepted by the PWD. There is nothing illegal, absurd or perverse in this regard.

98. Ms.Paranjpe stated that her arguments, based on Clause 8 of the SCC and Clauses 2 and 40 of the GCC would also apply to Claim No.2. She however stated that the decision in this regard qua Claim No.2 would follow from the decision in this regard qua Claim

No.1. For the reasons already furnished, the challenge to the award in so far as it pertains to Claim No.2 on these grounds also is rejected.

99. The challenge to the award in respect of Claim No.2 is thus rejected. The award in this regard is upheld.

Re: CLAIM NOS.C3 AND C4

100. Claim Nos.C3 and C4 were rejected by the arbitrators. The Respondents have not challenged the award in this respect. It is therefore not necessary to deal with the award in respect of Claim Nos.C3 and C4.

Re: CLAIM NOS.C5

101 Claim No.C5 pertains to compensation for lost productivity and efficiency. The arbitrator awarded a sum of Rs.54,52,000/- against the Respondent’s claim of Rs.5,05,00,636/-. I must confess that I have some difficulty in understanding the relevant parts of the statement of claim pertaining to Claim No.C5. I therefore prefer to quote the same :

"**C-5) COMPENSATION FOR LOST PRODUCTIVITY AND EFFICIENCY :**

> Delays that extend the contract performance time or result in an acceleration of the contractor's schedule undoubtedly result in decreased efficiency of the contractor's performance. Lost productivity changes a contractor's work plan from an operation organized to maximize production into a start-stop, hurry -and wait process. Such inefficiency not only increases the contractor's direct cost, but also may have substantial detrimental effects on the labour force. Costs for reduced productivity, if actually experienced, will be important part of the delay claim.
>
> On the total work, we have a labour component of about 30% i.e. in work done for Rs.42,08,38,634.00 we had a labour component of Rs.12,62,51,590.20. Due to various disturbances and hindrances due to interruption the productivity of labour suffered loss of about 40% and thus we lost Rs.5,05,00,636.00 and the same may please be reimbursed.

102 Ms.Paranjpe's submission that the award in regard to Claim No.5 is based on no evidence and that the same is based purely on surmises and conjuncture, is well founded. This is the basis on which the arbitrator awarded the claim in a sum of Rs.54,52,000/-:-

"e. The nature of this work would require(d) about 47 nos. of these category of workers at an average monthly wages of Rs.4,000/- p.m. The split of these workers reasonably could be:

i.	Security Guards & Supervisors	12 Nos.
ii.	Carpenters	10 Nos.
iii.	Fitters	10 Nos.
iv.	Specialized masons	15 Nos.
		Total 47 Nos.

Wages for idle period of 32 months:- 47 x 29 x 4000/- = 54,52,000/- at average payment of Rs.4,000/- p.m.

I decide and award based on the facts of this case, that the Respondents shall pay to the Claimants Rs.54,52,000/- against their claim of Rs.5,05,00,636.00" (emphasis supplied)

103 Firstly, there was admittedly not an iota of evidence in support of the statement of claim. Mr.Parekh himself found it difficult to contend otherwise. This, therefore, is a case of an award being made on the basis of a total absence of evidence.

104 Secondly, it is pertinent to note that the first sentence in paragraph (e) of the award quoted

above, itself indicates that there was no evidence. This is clear from the fact that the arbitrator has not said that during the extended period there was in fact any deployment of labour. He has merely stated what according to him the nature of this work "would require". In the next sentence the arbitrator again merely states what according to him the split-up of these workers reasonably "could" be.

105 The question before the arbitrator is not what the work according to him, "would" require, but what had actually transpired. Then again the question is not what the split up of these workers could be but what it actually was.

106 There is not a whisper in the award which suggests that the arbitrator came to the conclusion that there was in fact any deployment of labour. Nor is there a whisper as to the kind of labour deployed.

107 Indeed the arbitrator could have done no better for there was in fact no evidence whatever to support the claim. It was conceded that there was not a scrap of paper which even remotely indicated actual payment of wages to any labour. Indeed, there was not a scrap of paper to even indicate the presence of

workers.

108 The arbitrator sought to fill the total absence of evidence with hypothetical possibilities by holding what "would" or "could" have been the case. The award of claim No.5 is based therefore purely on surmises and conjecture.

109. Ms.Paranjpe’s challenge on the basis of clause 58 of the SCC is however not well founded. She submitted that the claim is barred under clause 58 of the SCC.

110 The fallacy in this submission arises from confusing a claim of damages with price variation. Clause 58 does not bar a claim for damages. It merely deals with the issue of price variation. If the price variation is due, clause 58 provides the manner in which the same is to be computed. A party may well be entitled to price variation and for damages for delay caused by the client. For instance during the extended period occasioned by default of the client, the contractor would be entitled to price variation. In addition thereto, he would be entitled to damages as for instance those arising as a result of infrastructure, head office expenses and idle

machinery/equipment. Unless the clause expressly prohibits the same, the mere fact that the contract provides for price variation would not excluded a claim for damages.

111 Ms.Paranjpe's challenges to the award in respect of claim No.5 on the ground of excepted matters and on the general finding regarding the period of the contract is also rejected for the reasons stated earlier.

112 In the circumstances, the award in respect of claim No.5 is set aside.

Re: CLAIM NO.6

113. Claim No.C6 was rejected by the arbitrators. The Respondents have not challenged the award in this respect. It is therefore not necessary to deal with the award in respect of Claim No.C6.

Re: CLAIM NO.7

114. The arbitrator has awarded a sum of Rs.1,21,08,467/- in respect of Claim No.7. The award

is contrary to Clause 58.4 of the SPC. The pleading in the statement of claim relied upon by Mr.Parekh is as under :

> "**C-7) COMPENSATION FOR DEMAND DUE TO NEED TO RESTRUCTURE RATES DURING EXTENDED PERIOD :**
>
> At the end of our contracted period in 07-11-1997 we have done work worth Rs.26,60,58,994.00 and the balance work remained to be executed. On this work, we charge 30% extra to account for abnormal price rise, in addition to usual escalation. We therefore demand an additional amount on Rs.15,47,79,640.00 of further work done, a sum of Rs.4,63,33,892.00. The basis of claim is the law laid down by supreme court in AIR 1989 SC 1034, P.M. Paul vs. Union of India."

115(a). The arbitrator has consciously and in terms ignored Clause 58.4 SPC and held in paragraph 25.0(c)(ii) as under :

> "ii. Though the parties have contemplated to accept the price adjustment formula based on price indices, such formula could not be insisted upon for such abnormal delay of almost 100%. However, the intention of the parties could be clearly seen that the amount payable are

> not firm for any such uncertain length of time."

(b). He then goes on to hold "but it is well known that the schedule of rates increases at about 10% per annum on an average".

The award is based upon these findings.

116. Firstly, the arbitrator was not entitled to ignore the express terms of the contract viz. Clause 58.4 of the SPC. As per the only possible construction of clause 58(4), it is admitted that even during the authorized extended period the formula for price variation provided therein was applicable in full force. The arbitrator has clearly gone contrary to Clause 58.4.

117. The present case is squarely covered by the judgment of the Supreme Court in the CH Ramalinga Reddy vs. Superitending Engineer (1999) 9 SCC 610. A reference to paragraph 17 of the judgment is sufficient to establish this.

> 17. Claim 8 was of "payment of extra rates for work done beyond agreement time at schedule of rate prevailing at the time of execution". The arbitrator awarded the sum of Rs. 39,540. Clause 59 of the A.P.

> Standard Specifications, which applied to th e contract between the parties, stated that no claim for compensation on account of delays or hindrances to the work from any cause would lie except as therein defined. The claim falls outside the defined exceptions. When extensions of time were granted o the appellant to complete the work, the respondents made it clear that no claim for compensation would lie. On both counts, therefore, Claim 8 was impermissible and the High Court was right in so holding. Learned counsel for the appellant drew our atte tion to the judgment of this Court in P.M. Paul v. Union of India5. The disputes that were there referred to the arbitrator were: who was responsible for the delay in completion of the building contracted for, what were the repercussions of such delay an how the consequences of the responsibility were to be apportioned. After discussing the evidence and the submissions of the parties, the arbitrator found that there was escalation and that it was, therefore, reasonable to allow compensation on account o losses under the first claim, which was "on account of losses caused due to increase in prices of materials and cost of labour and transport during the extended period of contract". In this context, this Court said that once it was found that th arbitrator had jurisdiction to hold that there was delay in the execution of the contract due to the conduct of the respondent, the respondent was liable for the consequences of the delay, namely, increase in prices. There was in P.M. Paul case no clause in the contract which provided that the respondent would not be liable to pay compensation on account of delay in the work from any cause nor was it stipulated, when extension of time was granted to the appellant to complete the work, that no claim for compensation would lie.

118. Secondly, this was not even the basis on which the claim was made as is evident from the relevant part of the statement of claim quoted above. The

Respondent never stated that in the event of the contract being extended by such a long period of time, the parties intended that Clause 58.4, was not to operate. Intention is a question of fact. In this case, the alleged intention was not even pleaded, leave alone proved. The arbitrator thus came to the conclusion on a basis that was not even urged before him.

119(a). Mr.Parekh relied upon a judgment of a learned Single Judge of this Court in the case of I.A.A.I. v. Three Circles *1991 Mh.L.J. 1459.* Clause 10(C) of the agreement in that case fell for the consideration of the learned Judge. Clause 10(C) of the contract provided for variation in the price of work i.e. claim for escalation in the contingency specified therein to certain extent. The Respondent could invoke clause 10(C) of the said contract if there was an increase in the price of material to be incorporated in the contract work (other than the material supplied by the Petitioner) or the cost of labour as a result of a statutory order in excess of 10% subject to conditions prescribed thereby.

(b). Admittedly, the Respondent made the claim for escalation on general principles of law and equity and

not in terms of Clause 10(C). The Petitioner rejected the claim on the ground that it was made contrary to Clause 10(C). The arbitrator however awarded the amount. It was contended on behalf of the Petitioner that the award was contrary to Clause 10(C).

(c). Mr.Parekh relied upon paragraphs 7 and of the judgment, which read as under :

> "7. Shri. M.H. Shah, the learned Counsel for the Petitioner, relied on the judgment of the Hon'ble Supreme Court in the case of *Thawardas Pherumal and another vs. Union of India,* reported in *AIR 1955 SC 468*. Shri. Shah submitted that the impugned award was assailable, as the Arbitrator had awarded the claim for escalation in teeth of a provision in the contract prohibiting entertainment of such a claim. Clause 10(C) of the contract provides for sanction of claim for escalation in specified contingencies. It does not follow therefrom that the said clause prohibits the Arbitrator duly appointed under clause 25 of the contract from accepting the claim for escalation in other situations. Shri. Shah relied on paragraphs 7 and 8 of the abovereferred judgment in particular. It is enough to refer to clause 6 of the Agreement construed by the Hon'ble Supreme Court in the abovereferred case. The said clause read as under :-
>
> > "The Department will not entertain any claim for ideal labour or for damage to unburnt bricks due to any cause whatsoever."

In view of an express prohibition in the contract in terms aforesaid, the Court held that the award made by ignoring the abovereferred clause was without jurisdiction. No such clause exists in the contract in our case. No such clause can be inferred by necessary implication in our case. The language of clause 10(C) of the contract does not warrant any such implication. The view taken by the Arbitrator is a plausible view.

8. The learned Counsel for the Petitioner also relied on another judgment of the Hon'ble Supreme Court, i.e. in the case of *Continental Construction Co. Ltd. vs. State of M.P.*, reported in *AIR 1988 SC 1166*. This case is also, with respect, clearly distinguishable. In paragraph 10 of this judgment, the Hon'ble Supreme Court *inter alia* observed as under :-

> "It has to be borne in mind that in the instant case there are specific clauses referred to hereinbefore which barred consideration of extra claims in the event of price escalation. That was not so in *Tarapore and Co.'s* case. That made all the difference."

In the case of *Continental Construction Co. Ltd.* (supra), the Hon'ble Supreme Court distinguished the case of *M/s. Tarapore and Company vs. Cochin Shipyard Ltd., Cochin, and another* reported in *1982 (2) SCC 60*, where the claim for escalation was upheld. The ratio of the judgment of the Hon'ble Supreme Court in the case of *Continental Construction Co. Ltd.* (supra) is of no assistance to Shri. Shah in view of there being no clause in the contract dated 4th July 1986 prohibiting the award of escalation amount, if a case was made out on facts and in law to the satisfaction

of the Arbitrator in that behalf."

120. The judgment is clearly distinguishable. Clause 10 in that case was not qualified in the manner in which Clause 58.4 is qualified. Clause 58.4 of the SPC expressly provides that in view of the price adjustment contained therein, no other adjustments viz. increase or decrease due to statutory measures/levies etc. will be allowed for any reason whatsoever. Indeed it was in view of the presence of such a bar that the judgments of the Supreme Court referred to therein held that the claim was not maintainable. Conversely it was the absence of such a bar that led the learned Judge to distinguish the case before him from the judgements of the Supreme Court.

121. The award in respect of Claim no.7 is therefore set aside.

Re : CLAIM NO.8

122(a). Claim No.8 was made for compensation of additional costs of insurance and bank guarantees. The learned Arbitrator allowed the claim on the ground that the delay was mostly due to the Respondent. He therefore, granted additional costs paid by the

Respondent proportionate for the extended period on account of extending the bank guarantees and insurance policy.

(b). The only basis on which the claim was awarded is set out in paragraph No.26-d of the award which reads as under :-

> "26-d. Claim Computation :- The Claimants have submitted the details in Vol. C-10 against missing pages Nos.14, 14(a), and 14(b). The Respondents did not dispute about the details as well as the calculation part of it. The Respondents have also verified these details as regards the account of the Claimants on B.G. etc.
>
> I therefore decide and award extra cost as per undisputed expenses as under :"

(c). Under cover of a letter dated 6.9.2003 the Respondent forwarded certain pages which remained to be filed earlier with an amended pleading of 14.8.2003. The Respondent requested that the submission of 14.8.2003 be marked as Vol.C-10.

(d). On 13.11.2003, the Petitioner raised an objection inter-alia to the said material. The Respondent also did not admit the correctness of the contents of the said documents.

(e). The documents were never taken on record. The Respondent never sought to reintroduce the documents. It is these documents which admittedly contain the details of the bank guarantees and the policies, the costs of maintenance of which was made under claim No.8. Despite the same, the Arbitrator has held that the Respondent did not dispute the details as well as the calculation part of it. But the documents not having been even taken on record, it is difficult to understand how it could be held that the Respondent did not dispute the details thereof. Mr. Parekh fairly conceded that the documents were disputed. Nor is it possible to justify the Arbitrator's finding that the Respondent had verified the details as regards the accounts of the Respondent on bank guarantee etc.

. There was no question of the petitioner having verified the details as the documents themselves were not furnished or taken on record.

110. The award in regard to claim No.8 must therefore be set-aside on the ground that it was made without there being any evidence and on the ground that it was in breach of the rules of natural justice.

123. However, the challenge to the award in respect of claim No.8 on the ground that under clause 27(a) and (b) of the GCC and clause 43 of the GCC, the insurance and the guarantees and security deposit were in any event to be kept alive till the end of the second monsoon after virtual completion, is not well founded. The date of virtual completion was 31.5.2000. The guarantees were kept alive for two monsoons after virtual completion namely even after the extended date.

124. The award in respect of Claim no.8 is therefore set aside.

Re: INTEREST

125. The Arbitrator has awarded future interest. The rate stipulated is as per the relevant law. The relevant law is Section 31(7) of the Act as the award has not stipulated the rate. The award thus carries interest at 18% per annum in view of Section 31(7)(b) of the Act.

Re: COUNTER CLAIM

126. There does not apepar to be any infirmity in the award in respect of the counter-claim. The arbitrator has rejected Claim No.2 fo the counter-claim on the ground that the petitioner paid the same voluntarily to the BMC without any notice. It is further held that the payment made by the petitioner was not with respect to the contractual provisions for which the respondent was liable.

127. The challenge to the awardin respect of the Counter-claim thus fails.

128. In the circumstances the challenge to the award succeeds with respect to Claim Nos.1 and 3 to 8. The rest of the award i.e. with respect to Claim No.2, the award of interest and the rejection of the counter claim is upheld. There shall be no order as to costs.

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